IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06/01/2003

Coram

The Honourable Mr. Justice R.JAYASIMHA BABU
and
The Honourable Mrs. Justice K.GNANAPRAKASAM

L.P.A.No. 17 of 1998
and
C.M.P.No.1667 of 1998

1.Sri Gangai Vinayagar Temple,
Pondicherry,
rep. by Members of Trust Committee.

2.Thirumudi N.Sethurama Chettiar,
by legal heirs.

3.R.Jayaraman
4.A.N.Govindaraj
5.Ramayya Chettiar,
6.Arun ..Appellants

-vs-

1.Meenakshi Ammal
2.Lakshmi
3.Ponny
4.Saradha
5.Somasundaram
6.Murugayan
7.Ashok Kumar @
Rene Edward Ashok ..Respondents

Appeal against the judgment and decree dated 25.4.1997 passed by the learned single Judge in Appeal No.581 of 1983.

!For Appellants : Mr.R.Alagar,
Senior Counsel
for Mr.V.Sitharanjan Dass

^For RR-1 to 6 : Mr.G.Masilamani,
Senior Counsel
for G.Mani Associates

For R-7 : No appearance

:JUDGMENT

(Delivered by R.JAYASIMHA BABU, J.)
The appellants are the Trustees of Sri.Gangai Vinayagar Temple, Thirumudi Nagar, Pondicherry. They had executed a lease deed on 8.11.196 7, marked as Ex.A-2, in favour of one Kanniah Chettiar, in respect of a plot of land on which the lessee was to erect a theatre. The lease was for a period of fifteen years, commencing from 1.1.1968. In that document, Ex.A-2, the persons executing the document as lessors are described as the President, Secretary, Treasurer and Member of the Trust Committee of Gangai Vinayagar Temple. It also contains a declaration that "the lessors in the above capacity have declared that the said immovable belongs to the said Gangai Vinayagar Temple".

2. The lessee having died after constructing the theatre, his widow filed a suit in O.S.125 of 1976, which suit came to be later renumbered as O.S.No.5 of 1978, impleading therein the temple as the first respondent and the members of the Trust Committee as persons representing the temple Trust. Three persons, who were alleged to be those to whom the site on which the theatre stood was sought to be sold by the Trustees, were also impleaded as defendants 7 to 9. The prayer made in that suit was for an injunction to restrain the defendants from interfering with the plaintiff's possession till the expiry of the period of lease. The title of the lessor was not questioned. It was alleged in the plaint that the proposed sale would be in breach of trust. In the written statement that was filed on behalf of the temple and the Trustees, it was specifically stated that "...the defendants have no intention to interfere with the plaintiff's possession otherwise than by due process of law unless the plaintiff herself calls the defendants to take possession otherwise."

3. During the pendency of that suit, the Trustees instituted two other suits, which were numbered as O.S.Nos.6 of 1978 and 7 of 1978, claiming arrears of rent from the lessee. In those suits it was also alleged that the property had been sold to the defendants, impleaded as 7, 8 and 9 in the suit that had been filed by the lessee. The three suits were tried together, common evidence was recorded and a common judgment pronounced.

4. The Trial Court held that the lessee was entitled to remain in possession of the property for the duration of the lease. For so holding, it relied upon the statements made by the defendants in the suit wherein they had categorically stated that they had no intention to interfere with the plaintiff's possession. That finding was sufficient to dispose off the lessee/plaintiff's suit O.S.No.5 of 1978. The trial Court dismissed that suit on the ground that as there was no real threat to plaintiff's possession, there was no cause of action for the suit.

5. The Trustees in their further additional written statement filed in O.S.No.5 of 1978 had pleaded that the property was the personal property of the temple and the Trustees. That plea was of no materiality for the purpose of adjudicating upon the lessee's right to retain possession for the duration of the lease. The Trial Court taking note of that plea had framed an issue in

O.S.No.5 of 1978, that issue being issue No.2, which reads thus:-
"Whether the suit property is not the personal property of Sethuraman Chettiar and whether the plaintiffs are not estopped from questioning the title of the land lord or his vendors?"
The lessee/plaintiff had not questioned the title of the Trust at any point of time. Moreover, the plea of the defendants was not that the property was the personal property of Sethuraman Chettiar. That issue was framed without properly appreciating the pleadings and the scope of the suit.

6. In the two suits filed by the Temple and the trustees, the following issue was framed as Issue No.3:-

"Whether the suit property belongs to a public temple governed by the Act? If so whether the suit is maintainable for want of sanction under Section 26 of the Hindu Religious Institution Act?"

7. The trial Court considered Issue No.3 so framed in O.S.Nos.6 and7 of 1978 along with Issue No.2 that it had incorrectly framed in the lessee's suit O.S.No.5 of 1978. In its common discussion under those issues it went into the question as to whether the temple was a public temple or a private temple and as to whether the permission from the statutory authorities was required for effecting the sale of the property owned by the temple as pleas that had been raised in O.S.No.6 and O.S.No.7 of 1978. That discussion shows that there was no dispute whatever on the point that the property had been acquired for the temple and that the persons who had instituted the suits were acting as the Trustees when they executed the lease and also when the suit was brought by them. The finding recorded by the Trial Court at the end of that discussion, therefore, has to be understood as the finding recorded by it on

Issue No.3 in O.S.Nos.6 and 7 of 1978 and not as a finding recorded in relation to an issue in O.S.No.5 of 1978, which issue neither directly nor substantially arose for consideration in O. S.No.5 of 1978.

8. O.S.No.6 of 1978 was decreed in part with the finding that the tenant was in arrears of rent in the sum of Rs.268/-. The last suit O.S.No.7 of 1978 was dismissed and no relief was granted to the lessor in that suit.

9. The lessee being aggrieved by the decree in O.S.No.6 of 1978 filed an appeal in A.S.No.581 of 1983. No appeal was filed against the judgment in O.S.No.5 of 1978. The lessor did not file any appeal against the dismissal of their other suit, O.S.No.7 of 1978.

10. The learned single Judge in a very elaborate judgment overruled the objection that was raised by the learned counsel for the temple and its Trustees that the appeal was barred by res judicata on the ground that the finding recorded on issue No.2 in O.S.No.5 of 1978 had become final and that precluded the lessee from challenging the finding recorded on issue No.3 in O.S.No.6 of 1978. The learned single Judge examined the evidence and held that the temple is a public temple and that the property belonging to the temple cannot be alienated without obtaining the requisite permission from the statutory authorities. He, therefore, reversed the finding recorded by the

trial Court on issue No.3 in O.S.No.6 of 1978.

11. Before us, the only question that was argued by Sri.Alagar, learned Senior Counsel for the appellant, was that the learned single Judge was in error in holding that the appeal was not liable to be dismissed on the ground of res judicata. Learned Counsel placed reliance on the decision of the Apex Court in the case of Premier Tyres Ltd. v. The Kerala State Road Transport Corporation (AIR 1993 SC 1202), a decision rendered by a three Judge Bench, wherein it was inter alia held thus:-

"Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequence follows when a judgment or decree in a connected suit is not appealed from."

The effect of that judgment, as rightly pointed out by the learned counsel, is that the law that had been declared by a Full Bench of this Court in the case of Panchananda Velan v. Vaithyaanantha Sastrial (1 906 ILR 29 Madras 333); by a Division Bench of this Court in the case of Kathoon Bivi Ammal and another v. Arulappa Nadar and another (AIR 1970 Madras 76); and by a Full Bench of the High Court of Alahabad in the case of Jai Narain v. Bulaqi Das (AIR 1969 All. 504) is to be regarded as having been overruled to the extent the same is inconsistent with the law laid down by the Apex Court. Learned counsel also relied on the decision of a Division Bench of this Court in the case of D.Krishnamurthi v. K.Parasuraman 1993 (2) M.L.J., 674, wherein the Court has taken similar view as has been taken by the Apex Court in the case of Premier Tyres Ltd. v. The Kerala State Road Transport Corporation (AIR 1993 SC 1202).

12. Learned counsel submitted that as the judgment under appeal before the learned single Judge was a common judgment which dealt with the relief sought in three suits, one of which had been brought by the appellant and in which suit the Court had raised an issue which issue had been considered along with the issues that were raised in the two suits that had been filed by the respondent in the appeal, the effect of the appellant not filing an appeal against the decree in the suit that it had brought earlier and which suit also was disposed of by the common judgment was to render the finding recorded in the suit filed by the appellant final and binding and that finding would constitute res judicata.

13. This argument would be impeccable and would have to be accepted, only if the appellant succeeds in establishing that issue No.2 in O.S.No.5 of 1998 was in fact an issue which directly and substantially arose for consideration in that suit and th finding had been recorded thereon in favour of the appellant.

14. Mr.Masilamani, learned Senior Counsel by the respondents,

submitted that the decision relied upon for the appellants is inapplicable to the facts of this case. Learned counsel drew our attention to the decision of the Apex Court in the case of Sajjadanashin Sayed Md.B. E.Edr. v. Musa Dadabhai Ummar (AIR 2000 SC 1238), wherein the Apex Court elaborately discussed the distinction between that which is ' collateral and incidental' and that which can be regarded as 'directly and substantially being in issue'. The Court emphasised the words employed in Section 11 of the Civil Procedure Code, 'directly and substantially in issue' and held that they do not have the same meaning as ' collaterally or incidentally in issue'. The Court observed at paragraph 14 thus:-

"□ collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the later the principal issue."

The Court referred with approval to the statement of law by Dixon, J. of the Australian High Court in Blair v. Curran (1939) 62 CLR 464 (5 53) that,

"The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision on judgment, or necessarily involved in it as its legal justification or foundation, from matters which, even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation of a groundwork of the judgment. The authors say that in order to understand this essential distinction, one has always to inquire with unrelenting severity -- is the determination upon which it is sought to find an estoppel so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do.

The Court further noted,

"It is suggested by Dixon, J. that even where this inquiry is answered satisfactorily, there is still another test to pass; viz., whether the determination is the 'immediate foundation' of the decision as opposed to merely a proposition collateral or subsidiary only, i.e., not more than part of the reasoning supporting the conclusion."

15. The Court also quoted with approval the observation of Harlan, J. of the Supreme Court of The United States in the case of Hoag v. New Jersey (1958) 356, US 464:

"Under this rule, if the records of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties."

The Court reiterated the law that had been laid down by the Apex Court in the case of Isher Singh v. Sarawan Singh (AIR 1965 SC 948) that one has to examine the pleadings, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue.

16. The Court further pointed out that even where issues had been framed in the suit, it would not necessarily follow that the findings recorded thereon are to be treated as being findings on issues which directly and substantially arose for consideration in the suit. The Court approved the statement of the principle by Mullah that "it is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally and incidentally must be determined on the facts of each case. A material test to be applied is whether the Court considers the adjudication of the issue material and essential for its decision."

17. After referring to the decisions of the Privy Council in the case of Run Bahadur v. Lucho Koer (1985 ILR 11 Cal. 301 (PC) and Asrar Ahmed v. Durgah Committee, Ajmer (AIR 1947 PC 1) and that of the Supreme Court in Pragdasji v. Ishwarlal Bhai (AIR 1952 SC 143), the Court held,

"These three cases are therefore instances where in spite of a specific issue framed and an adverse finding thereon in an earlier suit, the finding was treated not as res judicata as it was purely incidental or auxiliary or collateral to the main issue in each of these cases and not necessary for the earlier case nor its foundation."

18. The principles so enunciated by the Apex Court have to be applied to the facts of a given case by examining the pleadings, the issues that had been framed and the judgment that had been rendered thereon. If it is found after such examination that the findings recorded was one which was not necessary for the final decision in the case or that it did not constitute the immediate foundation for the ultimate decision, such a finding cannot be regarded as a finding on a matter which was directly and substantially in issue and no question of res judicata would arise.

19. We have, at the outset, set out the pleas that were taken by the parties to the suits, the nature of the issues and the findings recorded by the Trial Court on those issues. They clearly show that issue No.2 framed in O.S.No.5 of 1978 was wholly unnecessary, the issue framed also being faulty and not being reflective of the pleas that had been taken by the parties. The finding on that issue can by no means be regarded as being necessary and it is impossible to regard it as constituting the immediate foundation for the ultimate decision in the suit. No question of regarding the finding thereon as res judicata would, therefore, arise.

20. No other question was argued before us. We do not find any merit in this appeal. The same is dismissed. The C.M.P. is closed.

Index:Yes
Website:Yes

To

The II Additional District Judge,
Pondicherry.

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